

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.)
)
 MICAH JOEL AHKEEM IVERSON KELLY,)
)
 Defendant.)

Case No.: 2:15-cr-0041-GMN-NJK

ORDER

Pending before the Court is the Government's Emergency Motion in Limine, (ECF No. 53), to which Defendant filed a Response (ECF No. 55). A jury trial on this case is set to begin on Monday, November 30, 2015. (*See* ECF No. 49).

The Government states that Defendant's Notice of Expert Testimony (ECF No. 51), filed today, is the first indication of Defendant's strategy to "challeng[e] the constitutionality of the scheduling of Ethylone as a controlled substance." (Mot. in Lim. 1:22–23, ECF No. 53). Because this issue is "a legal, as opposed to a factual, question," the Government argues that the issue should have been raised as a pretrial motion and cannot be raised before the jury during trial. (*Id.* at 1:23–2:8). As such, the Government requests that the Court preclude Defendant from raising this issue at trial, including calling expert witnesses on the issue. (*Id.* at 1:18–20).

Defendant responds that the stated defense is factual not legal, citing to their trial brief. (Def.'s Resp. 1:19–22). The trial brief, however, fails to provide a basis for bringing this legal issue before the jury. (*See* Def.'s Sealed Trial Br., ECF No. 43).

Further, Defendant argues that the motion has not been waived by not bringing it as a pretrial motion. (*Id.* at 21–26). As explained in a case cited by Defendant's Trial Brief, "[P]ermissive pretrial matters are timely if asserted at or before trial." *U.S. v. Smith*, 866 F.2d

1 1092, 1096 (9th Cir. 1989). Further, Defendant cites Federal Rule of Criminal Procedure 12, to
2 indicate that Defendant's motion does not fall within the motions that *must* be made before trial
3 under Rule 12(b)(3). Here, Defendant is correct that he has not waived his right to bring this
4 issue before the Court because it was not a mandatory defense under Rule 12(b)(3).

5 Nevertheless, Defendant has failed to substantiate that its defense is factual and not
6 legal; therefore, this issue must still be raised as a motion for the Court to determine rather than
7 a factual issue for the jury to decide. *See, e.g., United States v. Sotelo-Murillo*, 887 F.2d 176,
8 182 (9th Cir. 1989) (explaining that a due process defense is a question of law, "not an issue for
9 the jury").


10 **IT IS HEREBY ORDERED** that the Government's Emergency Motion in Limine
11 (ECF No. 53) is **GRANTED in part and DENIED in part**.

12 **IT IS FURTHER ORDERED** that if Defendant chooses to assert this issue in a motion,
13 then a stipulation to continue trial will be granted, and Defendant's motion will be referred to
14 the assigned United States Magistrate Judge for further briefing and a determination on the
15 outstanding legal issue.

16 **IT IS FURTHER ORDERED** that Defendant's stipulation to continue trial shall be
17 filed before 2:00 pm on Wednesday, November 25, 2015, as this time is the deadline to call off
18 the jury for Monday morning. Defendant's motion shall then be filed by Friday, December 11,
19 2015.

20 **IT IS FURTHER ORDERED** that if Defendant does not choose to assert this motion,
21 then the issue will be deemed waived, and trial will continue as scheduled on Monday,
22 November 30, 2015.

23 **DATED** this 24th day of November, 2015.

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Gloria M. Navarro, Chief Judge
United States District Judge